

a proportionate amount of the assets for the payment of their claims. There is, however, no language in such section which purports to give the court or the superintendent any right to change the trust title of the bank to the assets in question to an absolute title. The title of the bank to the deposit in question is that of a trustee, the legal title might be said to be in the bank but the entire equitable title is in the subdivision. The relation of debtor and creditor does not exist between the bank and the subdivision. *Franklin Nat. Bank vs. City of Newark, supra.*

In specific answer to your inquiry, it is my opinion:

1. When a sanitary district organized under the sanitary district act of Ohio (Sections 6602-34 to 6602-106, General Code) deposits funds coming into its possession in a bank in any other manner than that provided in Section 6602-79, General Code, such funds so on deposit constitute a preferred claim in the event of a liquidation of the bank by reason of insolvency providing the bank had knowledge of the nature of and ownership of the funds so deposited.

2. When the president or other executive officer of a bank is also an executive officer of a depositing corporation such bank should be held to have knowledge of the ownership of the funds on deposit.

3. When a sanitary district has illegally deposited its funds in a bank which has knowledge of the illegality of the deposit and the bank has delivered to the sanitary district securities to insure the return of the funds on deposit such contract by reason of its ultra vires nature, is void, and neither party thereto can obtain any rights thereunder.

4. When a taxing subdivision is the owner of a preferred claim against a bank in liquidation such subdivision may not legally waive the priority of its claim and consent to become a general depositor and share with other general depositors in the reorganization of the bank in liquidation.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2089.

DEPUTY TAX COMMISSIONER—CIVIL SERVICE COMMISSION TO
DETERMINE IF POSITION IS IN FACT IN UNCLASSIFIED SER-
VICE.

SYLLABUS:

1. *The provisions of section 154-38a, General Code, in respect to deputy tax commissioners, are not subject to, limited or qualified by paragraph 9 of subsection (a) of section 486-8, General Code.*

2. *The Civil Service Commission of the State of Ohio is governed solely by the provisions of section 154-38a, General Code, in determining whether a person appointed by the Tax Commission under section 154-38a to act for and in place of the Tax Commission in the administration of the duties that devolve upon the Tax Commission by law is in the classified or unclassified service. In determining whether the position of deputy tax commissioner is in fact in the unclassified service, the Civil Service Commission has no recourse to the test or*

conditions established by the legislature in paragraph 9 of subsection (a) of section 486-8, General Code.

COLUMBUS, OHIO, December 30, 1933.

The Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your letter which reads in part as follows:

“Section 154-38a as passed by the recent General Assembly of Ohio, provides as follows:

‘The Tax Commission of Ohio may appoint not more than fifteen deputy tax commissioners. Each of such deputy tax commissioners shall, under such regulations as may be prescribed by the Tax Commission, be authorized to act for and in the place of the Tax Commission in the administration of the laws which the Commission is required to administer. Each of such deputy tax commissioners shall be paid such compensation as the Tax Commission may fix, and shall serve during the pleasure of the Tax Commission. The deputy tax commissioners shall be in the unclassified civil service of the state.’

Your opinion is respectfully requested as to what definitely constitutes a deputy under this statute. It will be noted the statute makes the mandatory requirements that each such deputy ‘be authorized to act for and in the place of the Tax Commission in the administration of the laws which the Commission is required to administer.’”

The question raised by your inquiry is whether the provisions of section 154-38a, General Code, in reference to deputy tax commissioners, are subject to or limited by paragraph 9 of subsection (a) of section 486-8, General Code, which reads as follows:

“The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required in this act.

* * *

* * *

* * *

9. The deputies of elective or principal executive officers authorized by law to act for and in the place of their principals and holding a fiduciary relation to such principals.”

The legislature, in the enactment of the civil service law (sections 486-1 to 486-31, inclusive), expressly divided the civil service into the unclassified (subsection (a) of section 486-8) and the classified service (subsection (b) of section 486-8). The unclassified service, as defined in subsection (a) of section 486-8, includes deputies of elective or principal executive officers authorized by law to act for and in place of their principals and holding a fiduciary relation to such principals. It is apparent from a reading of paragraph 9 of subsection (a) of section 486-8 that before the position of a deputy of an elective or principal executive officer can be said to be in the unclassified service, as defined by the legislature, it must appear that the incumbent of the position is not only authorized by law to act for and in place of his principal but must also hold a fiduciary relation to him. In other words, these two conditions or requirements must exist

before the position of a deputy can be said to be in the unclassified service, as defined in subsection (a) of section 486-8.

In passing, it is well to bear in mind that the courts of this state have held that if the duties of a position create a fiduciary or confidential relation of such a nature as to make it impracticable to ascertain the merit and fitness of an applicant for the position by competitive examination, as required by section 10 of article XV of the Constitution of Ohio, the position is deemed to be one which is not subject to the aforesaid constitutional provision or the legislation enacted pursuant thereto (section 486-1, et seq.). See *State, ex rel. Bryson, vs. Smith*, 101 O. S. 203, and *State, ex rel. Day, vs. Emmons et al.*, 126 O. S. 19. That rule of law is applicable irrespective of the title or designation given to a position (*State, ex rel. Bryson, vs. Smith, supra*) or even if the incumbent of a position is not a deputy, so long as the duties of the position make it impracticable to ascertain the merit and fitness of an applicant by competitive examination.

McQuillan, in the second edition of his work on Municipal Corporations, Vol. II, page 43, defines a deputy as:

“One authorized by an officer to exercise the rights which the officer possesses for and in place of the latter is generally said to be a deputy * * Nor is a deputy equivalent to a *mere assistant*, for the deputy, generally speaking, possesses all the powers of his principal. *A deputy is authorized by law to act generally for and in place of his principal. If the law does not authorize one holding a position to do so, he is not a deputy but a mere employe.*” (Italics the writer’s.)

Thus, a deputy is generally understood in law as a person who possesses the power by law to act as if he himself were the actual incumbent of the office. However, the mere fact that a person may be a deputy authorized by law to act on behalf of and for another is not sufficient, according to the provisions of subsection (a) of section 486-8, to exempt the incumbent or the position from being placed in the classified service, inasmuch as the legislature has seen fit to require that such a person also sustain or hold a fiduciary relation to his principal before the position or the incumbent thereof can be deemed to be in the unclassified service, as defined by the legislature (paragraph 9 of subsection (a) of section 486-8). Thus, the legislature, in placing deputies of elective or principal executive officers in the unclassified service, has recognized not only the usual test applied by courts in determining whether a person is a deputy or not, but has gone one step further and has provided that if a person is a deputy, as defined by law, such a person can be placed in the unclassified service only when such deputy also sustains a fiduciary relation to his principal. Unless both conditions exist, a position occupied by a deputy of an elective or principal executive officer cannot be deemed to be in the unclassified service, as defined in subsection (a) of section 486-8. Subsection (a) of section 486-8, defining the unclassified service, is a statute of a general nature and applies, unless otherwise provided by law, to all positions, irrespective of terminology or title, which come within the terms of that statute.

The legislature, in the enactment of section 154-38a authorizing the Tax Commission to appoint fifteen deputy tax commissioners, has expressly clothed deputy tax commissioners with the authority to act for and in place of the Tax Commission in the administration of its duties. The legislature also has expressly provided therein that the deputy tax commissioners are to be in the unclassified service. The question arises as to whether those positions are to be placed in

the unclassified service by the Civil Service Commission without inquiring or determining whether the duties of those positions create a fiduciary relation between the deputy tax commissioners and the Tax Commission of Ohio. In other words, is the Civil Service Commission to be guided solely by the provisions of section 154-38a or shall it take into consideration the conditions set forth by the legislature in paragraph 9 of subsection (a) of section 486-8 in determining whether a person designated by the Tax Commission as a deputy tax commissioner is in the classified or unclassified service?

The rules of statutory interpretation to be observed in construing the provisions of section 154-38a, in view of the apparent conflict that exists between the provisions of that section and the provision of paragraph 9 of subsection (a) of section 486-8, are stated by Day, Judge, in the case of *Ex Parte Fleming*, 123 O. S. 16, at pages 20 and 21, as follows:

“Where the general provisions of a statute are found to be in conflict with the express provisions of a later act relating to a particular subject, the latter will govern, although the words of the earlier general act, standing alone, would be broad enough to include the subject to which the more particular provisions relate.’ *Thomas, Sheriff, vs. Evans*, 73 Ohio St., 140 76 N. E., 862.

‘Where the general provisions of a statute and those of a later one on the same subject are incompatible, the provisions of the latter statute must be read as an exception to the provisions of the earlier statute.’ *City of Cincinnati vs. Holmes, Admr.*, 56 Ohio St., 104, 46 N. E., 514.

In statutory construction it is a well-known rule that, ‘where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one.’ 36 Cyc., 1151.”

Applying these rules of statutory interpretation to the statutes in question, the conclusion is irresistible that the Civil Service Commission is to be guided solely by the provisions of section 154-38a in determining whether the persons designated by the Tax Commission of Ohio as deputy tax commissioners are in the unclassified or classified service.

This conclusion is further supported by the fact that the legislature has expressly stated in section 154-38a that the persons designated by the Tax Commission to act as deputy tax commissioners shall be in the unclassified service. That express provision in section 154-38a clearly evinces an intention on the part of the legislature that the conditions or requirements of paragraph 9 of subsection (a) of section 486-8 are not to be observed by the Civil Service Commission when it proceeds to determine for itself whether the duties assigned by the Tax Commission to its deputy tax commissioners are in fact such as to constitute them deputies clothed with the power to act for and in place of the Tax Commission of Ohio in the administration of the laws that devolve upon the Tax Commission. If the legislature had intended that the provisions of paragraph 9 of subsection (a) of section 486-8 were to be observed by the Civil Service Commission in determining whether the fifteen persons designated by

the Tax Commission as deputy tax commissioners were in the unclassified service, it would have been unnecessary for the legislature to have expressly provided in section 154-38a that such employes were to be in the unclassified service, inasmuch as the provision of subsection (a) of section 486-8, being general in nature, would have applied, on the omission of that provision in section 154-38a, to deputy tax commissioners appointed by virtue of the latter statute.

Whether the persons designated by the Tax Commission of Ohio as deputy tax commissioners are clothed with and actually exercise the power of acting for and in place of the Tax Commission in the administration of the duties imposed upon the Tax Commission by law, is a question of fact to be determined in the first instance by the Civil Service Commission from the duties assigned to and performed by such persons. In placing a position in its proper classification, the Civil Service Commission must be guided solely by the character of the duties it involves and not by the name or designation which may be given to the position.

Summarizing what I have said, it is my opinion that:

1. The provisions of section 154-38a, General Code, in respect to deputy tax commissioners, are not subject to, limited or qualified by paragraph 9 of subsection (a) of section 486-8, General Code.

2. The Civil Service Commission of the State of Ohio is governed solely by the provisions of section 154-38a, General Code, in determining whether a person, appointed by the Tax Commission under section 154-38a to act for and in place of the Tax Commission in the administration of the duties that devolve upon the Tax Commission by law, is in the classified or unclassified service. In determining whether the position of deputy tax commissioner is in fact in the unclassified service, the Civil Service Commission has no recourse to the test or conditions established by the legislature in paragraph 9 of subsection (a) of section 486-8, General Code.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2090.

CIGARETTE TAX STAMPS—WHOLESALE DEALER IN CIGARETTES
NOT REQUIRED TO AFFIX STAMPS TO PACKAGES SOLD TO
FEDERAL GOVERNMENT.

SYLLABUS:

1. *An Ohio wholesale dealer in cigarettes who after having bid a contract with the federal government, sells and delivers to the federal government at the Chillicothe Reformatory quantities of cigarettes, is not required by sections 5894-1 et seq., General Code, to affix cigarette tax stamps to the packages so sold and delivered, even though the cigarettes may thereafter be sold to visitors as well as inmates.*

2. *The cigarette stamp tax law (sections 5894-1 to 5894-21 G. C.) does not require such stamps to be affixed to cigarettes sold to the federal government.*

3. *The Ohio cigarette stamp tax law is not applicable to any sales of cigarettes on lands owned and used for governmental purposes by the federal government, where the State has not retained civil jurisdiction to such lands. (1932 O. A. G. 828 approved and followed.)*